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No. 93-581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALPHONSE FLETCHER, JR.,
Petitioner,

v.

KIDDER, PEABODY & COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION FOR RESPONDENT

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BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Kidder, Peabody & Co. Incorporated submits this brief in opposition to the petition for a writ of certiorari filed in this case.[1]

STATEMENT

Petitioner Alphonse Fletcher, Jr., was employed by Kidder, Peabody as a securities trader from late 1989 until March 1991. Soon after he resigned, he filed this lawsuit in state court in New York, claiming that respondent had discriminated against him on the basis of his race in violation of the New York State Human Rights

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[1] Kidder, Peabody & Co. Incorporated is a wholly owned subsidiary of Kidder, Peabody Group Inc., which in turn is a wholly owned subsidiary of General Electric Financial Services, Inc., which in turn is a wholly owned subsidiary of General Electric Co. It has no non-wholly owned subsidiaries.

Law. Specifically, he alleged that Kidder, Peabody had treated him disparately in the calculation and timing of his annual compensation for 1990.

Respondent moved to stay the lawsuit and to compel arbitration, relying on Fletcher's prior agreement to arbitrate any disputes with his employer. That agreement was contained in the "Uniform Application for Securities Industry Registration or Transfer" (the "U-4 Form") that Fletcher executed when he came to work for Kidder, Peabody in 1989. In this registration application, he agreed "to arbitrate any dispute, claim or controversy that may arise between [him] and [his] firm . . . that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." The New York Stock Exchange was one of the exchanges with which petitioner registered, and its Rule 347, in turn, requires arbitration of "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *See* Pet. App. A2 n.1; *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1650-51 (1991) (describing the same registration form and exchange rule). Petitioner recognized that he was bound by this rule when he served a demand to arbitrate certain *contractual* claims against Kidder, Peabody. But he took the position that his discrimination claim was not covered by the arbitration requirement.

Respondent's motion to compel arbitration was denied in the trial court, Pet. App. A35-A39, but the Appellate Division reversed. *Id.* at A30-A34. Relying on the decision in *Gilmer, supra,* where this Court required arbitration of an age discrimination claim brought by a registered securities representative, the Appellate Division held that arbitration of petitioner's claim was required by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* It rejected the suggestion that *Gilmer* is distin-

guishable because it involved the Age Discrimination in Employment Act (ADEA) rather than a claim of racial discrimination.

The New York Court of Appeals affirmed. It reasoned that a "party seeking to avoid enforcement of an arbitration clause governed by the FAA must demonstrate a congressional intent 'to preclude a waiver of a judicial forum' for disputes based on a particular statutory right." Pet. App. A6 (quoting *Gilmer*, 111 S. Ct. at 1652). Where the right derives from a state statute, the court held, the proper approach is to identify the most closely analogous federal statute and to consider Congress's intentions with regard to arbitration of rights created under that analogous statute. *Id.* at A6-A7. The New York Court of Appeals concluded that the proper comparison in this case was to Title VII, 42 U.S.C. § 2000e *et seq.*, *id.* at A7, and that rights under Title VII are subject to mandatory arbitration when parties so agree.

In reaching this conclusion, the court found nothing in the language or legislative history of Title VII or the 1991 Civil Rights Act indicating an intent to prevent waiver of the right to bring Title VII claims to court. *Id.* at A7-A9. It followed, in the court's view, that there was no basis for distinguishing this case from *Gilmer*. Specifically, the court noted that the waiver was no more "involuntary" than in *Gilmer* itself, *id.* at A9-A10, that any concerns about the "adequacy of the arbitral forum" had already been considered by Congress in enacting the FAA, *id.* at A10, and that, while prevention of racial discrimination is an important public policy, there was no basis for perceiving a congressional intent to allow mandatory arbitration of age-discrimination claims but not race-discrimination claims, *id.* at A11.[2]

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[2] The court went on to reject the contention, raised only by the plaintiff in a companion case, that the U-4 Form is a "contract of employment" excluded from coverage under the FAA by 9 U.S.C. § 1. It noted that this Court had expressly rejected the identical argument in *Gilmer*. *Id.* at A11-A13.

Judge Smith dissented, arguing that *Gilmer* is distinguishable because it did not involve a race-discrimination claim and concluding that, in the absence of an unequivocal ruling from this Court, the Court of Appeals should adhere to its own prior ruling barring waiver of the right to take discrimination cases to court. *Id.* at A22. The dissent also relied, in part, on a passage from a committee report accompanying the Civil Rights Act of 1991, in which a House committee expressed its "belief" that an agreement to arbitrate disputes "does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." *Id.* at A25-A26.

REASONS FOR DENYING THE WRIT

The ruling of the New York Court of Appeals does not warrant further review. There is no conflict whatever among the various state and federal courts that have considered the issue since *Gilmer*. All of these courts have held that the FAA mandates enforcement of a prior arbitration agreement when an employee brings suit based on discrimination claims cognizable under Title VII. Nor is this unanimity at all surprising: the conclusion that Title VII claims are subject to prior agreements to arbitrate is virtually compelled by this Court's decision in *Gilmer*.

1. Petitioner cannot contend that the lower courts are having difficulty in determining whether, in the wake of the decision in *Gilmer*, the FAA requires arbitration of Title VII claims brought by employees in petitioner's situation. To the contrary, as he notes, a "number of federal cases decided since *Gilmer* have addressed the decision's applicability to Title VII claims and have concluded that such claims, like those brought under the ADEA, are subject to compulsory arbitration under the terms of a Form U-4 arbitration provision." Pet. 15 n.6 (citing *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Bierdeman v. Shearson Lehman Hut-*

ton, Inc., 963 F.2d 378 (9th Cir.) (Table), *cert. denied*, 113 S. Ct. 328 (1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991)). We are aware of no federal decision going the other way. Moreover, the state courts appear to be just as unanimous in requiring arbitration of state-law claims analogous to Title VII claims. *See Spellman v. Securities, Annuities & Ins. Servs., Inc.*, 10 Cal. Rptr. 2d 427 (Ct. App. 1992); *Higgins v. Superior Court*, 1 Cal. Rptr. 2d 57 (Ct. App. 1991); *Bachus & Stratton, Inc. v. Mann*, 1993 Fla. App. LEXIS 5484 (May 19, 1993).[3]

These courts have all agreed with the New York Court of Appeals that *Gilmer* leaves no room for the conclusion that any category of discrimination claims, including those involving race or gender, is exempted from the FAA's coverage. In light of this prevailing consensus, there is no basis for suggesting that this Court needs to address the question.

2. The argument against review becomes even more compelling upon examination of the merits of petitioner's legal position. There is a good reason why that position has been rejected in case after case: there simply is no principled basis for drawing a distinction between the ADEA claim considered in *Gilmer* and claims cognizable under Title VII.

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[3] In cases like this one, involving an agreement to arbitrate a state statutory claim, the intent of the state legislature concerning arbitrability is irrelevant. *See Perry v. Thomas*, 482 U.S. 483, 489-90 (1987). An argument for exemption from the FAA's requirements, if possible at all, must therefore be based on a showing that *Congress* evinced an intent to preclude mandatory arbitration of an analogous *federal* statutory claim. *See* Pet. App. A6-A7; *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1309 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989).

a. The FAA states that a provision in a maritime or commercial contract in which the parties agree to settle future controversies through arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In recent years, this Court has made clear that claims brought under federal statutes, such as the antitrust laws, the securities laws, and RICO, "may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer*, 111 S. Ct. at 1652 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); and *Rodriguez de Quijas v. Shearson American Express, Inc.*, 490 U.S. 477 (1989)). In so ruling, the Court has concluded that a party agreeing to arbitrate a statutory claim "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628.

In *Gilmer*, the Court applied these principles in holding that an employee could validly agree to arbitrate future ADEA claims. It recognized that Congress had enunciated a general policy favoring full enforcement of all arbitration agreements in contracts covered by the FAA, 111 S. Ct. at 1651-52, and stated that particular statutory claims could be exempted only where *Congress* has " 'evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' " *Id.* at 1652 (quoting *Mitsubishi Motors*, 473 U.S. at 628). That intent must be reflected in the text of the statute at issue, in its legislative history, or in an " 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Ibid.* (quoting *Shearson American Express, Inc. v. McMahon*, 482 U.S. at 227).

Finding nothing in the text or history of the ADEA that addressed the question, *ibid.*, the Court went on to

consider whether allowing prospective agreements to arbitrate ADEA claims would be inconsistent with the statutory framework and purposes. It found no such inconsistency. The Court concluded that the broad social policy of deterring and redressing age discrimination would be served equally well if individual cases are resolved through arbitration rather than in court. *Id.* at 1653. It also concluded that arbitration would not undermine the role of the Equal Employment Opportunity Commission under the ADEA, *ibid.*, and would not unduly limit full enforcement of that statute, *id.* at 1655.

Virtually every aspect of the Court's reasoning in *Gilmer* is equally applicable when one considers the question of requiring arbitration of Title VII claims (or, as here, state claims analogous to Title VII claims). *See, e.g., Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d at 700 ("Although *Gilmer* involved a claim under the [ADEA], its reasoning is dispositive of the agreement to arbitrate Title VII claims before us."); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d at 307 ("*Gilmer* compels the conclusion that the FAA . . . appl[ies] equally to Willis' Title VII claims in the instant case"). *See also Dean Witter Reynolds, Inc. v. Alford*, 111 S. Ct. 2050 (1991) (vacating and remanding for reconsideration in light of *Gilmer* a prior Fifth Circuit decision, in a Title VII case, that had refused to enforce an arbitration agreement). In the Title VII context, there is once again a complete absence of statutory language that could be interpreted as barring mandatory submission of claims to arbitration. Moreover, there is no reason to suppose that diversion of some percentage of cases into arbitration would be any less consistent with the policies underlying Title VII than with the policies underlying the ADEA. And any effect on the role of the EEOC would be identical in both contexts.

b. Faced with this basic problem, the petitioner makes several arguments in an effort to persuade the Court that

there is some potential basis for drawing a distinction between the ADEA and Title VII in this context. First, he suggests that *Gilmer*, as an ADEA case, deserves less weight than a prior decision in which the Court discussed arbitration of Title VII claims—*Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander*, as petitioner points out, the Court did express the view that "an employee's rights under Title VII are not susceptible of prospective waiver," *id.* at 51-52, and that "arbitral processes [are] comparatively inferior to judicial processes in the protection of Title VII rights," *id.* at 57.

These statements, however, no longer retain much significance, at least for present purposes, when read in light of *Gilmer*. There, the Court distinguished *Alexander* and its progeny (*Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984)) in ways that make clear that *this* case is controlled by *Gilmer*. Thus, it pointed out that *Alexander* actually involved a quite different question: whether a Title VII suit was barred because the same allegedly discriminatory actions by the employer had previously been challenged in an arbitration proceeding as a violation of a union contract. *See* 111 S. Ct. at 1657 (*Alexander* "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims"). Moreover, as the Court in *Gilmer* explained, since *Alexander* involved *labor* arbitration, the Court had been concerned about the "tension between collective representation [by a union] and individual statutory rights," and the FAA, with its liberal policy favoring arbitration agreements, was inapplicable. *See ibid.* Finally, the Court in *Gilmer* noted that the "mistrust" of the arbitral process expressed in *Alexander* had been undermined by more recent decisions endorsing arbitration as a useful means of dispute resolution. *Id.* at 1656 n.5. In sum, it is impossible to read *Gilmer* and come

away with the conclusion that *Alexander* retains any relevance in the present context.

Petitioner goes on to argue that racial discrimination is more serious than age discrimination, and that the Court should therefore be unwilling to countenance enforcement of agreements requiring arbitration of race-based claims. In this regard, he notes that racial discrimination "poses a particular threat to the fabric of our society," and that this Court has consistently treated racial classifications as more suspect, and properly subject to stricter scrutiny, than age or gender classifications. Pet. 16.

This argument must be rejected as well. The issue, after all, is whether *Congress* evinced an affirmative intention to create an exception from the general policies of the FAA for a particular category of claims. And there is nothing to suggest that Congress ever drew the line suggested by petitioner—*i.e.*, made a determination that agreements to arbitrate future employment-related disputes are enforceable with respect to all types of discrimination claims *except* those involving race. On the contrary, the actual language of Title VII treats racial discrimination and other covered forms of discrimination (based on religion, sex, or national origin) identically. Nor is there any reason to conclude that Congress established a hierarchy of statutes, viewing claims under Title VII as less appropriate for arbitration than claims under the ADEA. In sum, it would be an exercise in pure judicial lawmaking for a court to decree that the pro-arbitration policies expressed by Congress in the FAA are outweighed by a perceived need to guarantee judicial consideration of every claim of racial discrimination.

Finally, petitioner argues that the legislative history of the 1991 Civil Rights Act reveals a congressional intent to preclude mandatory arbitration of Title VII claims. But here again, the argument was properly rejected by the court below. To begin with, the actual language of the 1991 amendments to Title VII provides no support

whatever to petitioner's position. The provision under discussion in the passages of legislative history cited by petitioner—section 118 of the 1991 Act, Pub. L. No. 102-166, 105 Stat. 1071, 1081—merely states that various "alternative means of dispute resolution," including arbitration, are "encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution Encouraged). Such an expression of "encouragement" hardly suggests that a prior agreement to arbitrate discrimination claims should be unenforceable. Indeed, it would tend to support the contrary conclusion.

Nor do the statements in the legislative history cited by petitioner suggest that the new Act addresses this issue. Instead, they merely set forth an understanding of the pre-existing law (a belief that employees cannot be forced to arbitrate Title VII claims) and then state that the new section is not intended to *change* that existing law. *See* 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (interpretive memorandum prepared by Rep. Edwards) ("This section is intended to be consistent with decisions such as *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which protect employees from being required to agree in advance to arbitrate disputes under Title VII and to refrain from exercising their right to seek relief under Title VII itself."); H.R. No. 40(I), 102d Cong., 1st Sess. 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635 ("[T]he Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. . . . The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available."); H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 41 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 735 (same).

At most, therefore, these statements reflect the views of one congressman and two committees about the proper

interpretation of Title VII *as it was originally enacted in 1964*. Such *post hoc* pronouncements are generally accorded little or no weight. *See, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 & n.13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979). And the statements at issue here are particularly unworthy of serious consideration, for two reasons.

First of all, the two committee reports merely reflect an understanding of the law *prior to Gilmer*.[4] At that time, many observers, including courts, interpreted the *Alexander* case (cited in the two committee reports) as precluding mandatory arbitration of Title VII claims. *See, e.g., Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 186 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990); *Swenson*, 858 F.2d at 1305-07. It is hardly surprising, or significant, that the committees noted this prevailing interpretation.

As for Representative Edwards' "interpretive memorandum," it came much later in 1991, when the Act was being passed, and expressly took issue with *Gilmer*. 137 Cong. Rec. H9530 (daily ed.) ("No approval whatsoever is intended of the Supreme Court's recent decision in [*Gilmer*] or any application or extension of it to Title VII.") But such a statement, if anything, argues *against* petitioner's position. After all, it shows that Congress was aware, by the time it approved the final bill, of the likelihood that agreements to arbitrate Title VII claims would now be viewed as enforceable, and yet chose not to do anything to prevent such a ruling.

That conclusion is further buttressed by another analysis of the bill, introduced into the record by Senator Dole one week prior to its passage. He stated that section 118

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[4] The *Gilmer* decision was announced on May 13, 1991. The two committee reports cited here were issued on April 24 and May 17, 1991, and used identical language.

"encourages the use of alternative means of dispute resolution, *including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.*" 137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991) (emphasis added). He went on to say that "[i]n light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. *See Gilmer v. Interstate Johnson Lane Corp.*, 111 S. Ct. 1647 (1991)." *Ibid.* In light of these statements, it is clear that Congressman Edwards was not expressing a consensus view on this issue—even assuming that such an expression could constitute a valid substitute for actual congressional action. In sum, petitioner's effort to limit the scope of *Gilmer* by citing fragments of legislative history simply will not work.

CONCLUSION

The petition for a writ of certiorari should be denied.

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